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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

MARVIN MANDEL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether petitioners are entitled to writs of error coram nobis vacating their 1977 mail fraud convictions, even though the indictment states an offense and the evidence presented at trial supports their convictions, because the jury instructions were erroneous under *McNally* v. *United States*, 483 U.S. 350 (1987).

II

PARTIES TO THE PROCEEDING

In addition to the named parties, W. Dale Hess, Harry W. Rogers, III, William A. Rodgers, Irvin Kovens, and Ernest N. Cory are respondents.

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The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 862 F.2d 1067. The opinion of the district court (App., *infra*, 27a-57a) is reported at 672 F. Supp. 864.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1988. A petition for rehearing was denied on March 1, 1989 (App., *infra*, 58a-60a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1977, respondents were convicted of mail fraud, in violation of 18 U.S.C. 1341, and racketeering, in violation of 18 U.S.C. 1962. The convictions resulted from a scheme under which respondent Marvin Mandel, while he was Governor of Maryland, supported legislation favorable to a race track owned by the other respondents in return for gifts worth more than $380,000. All of the respondents had completed their sentences by 1982. In 1987, this Court decided *McNally* v. *United States*, 483 U.S. 350, in which it held that the mail fraud statute did not prohibit schemes to defraud citizens of their "intangible right" to honest government services. Respondents subsequently sought a writ of error coram nobis in the United States District Court for the District of Maryland. They asked to have their convictions vacated and the fines that they had paid returned. The district court granted that relief. App., *infra*, 27a-57a. The court of appeals affirmed. *Id.* at 1a-26a.

1. In May 1971, respondent Marvin Mandel, then Governor of Maryland, vetoed legislation that would have increased the number of racing days allocated to Marlboro Race Track from 18 to 36. The other five respondents then began negotiating to purchase the track. They completed the purchase at the end of 1971. While arranging to buy the track, the other respondents began to bestow gifts on Mandel. By May of 1982, they had given him a $45,000 interest in a land venture known as Ray's Point and a $140,000 interest in the Security Investment Company.[1]

[1] The evidence also showed that the other respondents gave Mandel thousands of dollars worth of clothing, $135,000 worth of bonds, and other valuable gifts. C.A. App. 335-353, 421-424. The court of appeals did not disagree with the dissenting judge's statement that "[t]he total amount received by Mandel has been conservatively estimated at $380,000." App., *infra*, 22a n.2.

Mandel, in return, had made known shortly after the other respondents purchased the track that he would not mind if his veto of the race track legislation was overridden, and it was. Doubling the number of racing days at the track substantially increased its revenues. Mandel subsequently sought to increase the number of racing days at Marlboro to 94, but that legislation did not pass. However, the State Racing Commission allowed Marlboro to run its races on a mile track, rather than a half-mile track, which further increased its revenues. *United States* v. *Mandel*, 591 F.2d 1347, 1354-1357, vacated, 602 F.2d 653 (4th Cir.) (en banc), second rehearing en banc denied, 609 F.2d 1076 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980).

The indictment described the scheme in detail and alleged that as a result of the scheme the citizens of Maryland had been deprived of their intangible right to Mandel's honest services. App., *infra*, 2a-3a. The charge to the jury included an instruction providing that a "citizen's right to have his Government conducted honestly and impartially, and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute." *Id.* at 5a. The respondents challenged the "intangible rights" aspects of the indictment and the instructions in the trial court and on direct appeal. The court of appeals rejected that challenge, although it vacated the convictions on other grounds. That decision was subsequently vacated by the en banc court, which affirmed respondents' convictions by an equally divided vote. 602 F.2d at 653.

2. In *McNally*, this Court held that mail fraud convictions could not be based on the theory that public officials' conduct had deprived the citizens of their intangible right to honest and impartial government. That interest, the Court concluded, was not a property interest of the sort

protected by the mail fraud statute.[2] Thereafter, respondents sought writs of error coram nobis, asking that their convictions be set aside and that the government return the fines they had paid. The district court granted that relief. App., *infra*, 27a-57a.

A divided court of appeals affirmed. App., *infra*, 1a-26a. The government had argued that the convictions could be upheld because the indictment alleged and the evidence showed that respondents had engaged in a scheme to deprive the citizens of Maryland of interests in property within the meaning of *McNally*. More specifically, the government had alleged that the bribes given to Mandel rightfully belonged to the State under a constructive trust theory and that the racing days, which are in essence a state license, are intangible property under *McNally* and *Carpenter* v. *United States*, No. 86-422 (Nov. 16, 1987). The court held, however, that "in a case in which the jury considers alternative theories of liability, we must reverse the convictions if either theory is an improper basis for punishment." App., *infra*, 13a. The court continued: "In order not to apply the rule, we must be able to say 'with a high degree of probability' that the jury did not rely on a legally incorrect theory." *Ibid.*, quoting *United States* v. *Alexander*, 748 F.2d 185, 189 (4th Cir.),

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[2] Congress recently amended the federal fraud statutes to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally* v. *United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Respondents, of course, must be judged according to the pre-amendment version of the mail fraud statute as construed in *McNally*.

cert. denied, 472 U.S. 1027 (1985). Since "the jury was quite free, and indeed instructed, to return a guilty verdict solely on the theory that the State of Maryland had been denied the 'faithful and loyal services of public officials,' " the court could not conclude with certainty that it had not based its mail fraud convictions on the impermissible intangible rights theory. App., *infra*, 13a.[3]

The court of appeals noted that the government had relied on the Seventh Circuit's recent decision in *United States* v. *Keane*, 852 F.2d 199 (1988), for the proposition that "granting a writ of error *coram nobis* is improper where the change in the law did not vitiate the criminality of the petitioners' conduct but only brings into question the propriety of the jury instructions." App., *infra*, 16a. The court rejected the Seventh Circuit's approach. *Id.* at 16a-17a.

Judge Hall, dissenting, noted that "[i]t has been black letter law since the Supreme Court recognized the coram nobis writ in *United States* v. *Morgan*, 346 U.S. 502 * * * (1954), that a reviewing court should grant the writ 'only under circumstances compelling such action to achieve justice.' *Id.* at 511." App., *infra*, 19a. He concluded that the *Alexander* standard—that convictions should be upheld despite faulty jury instructions only where there is a high degree of probability that the jury did not rely on an improper theory—was appropriate on direct review, but not on review pursuant to a request for a writ of error coram nobis. *Id.* at 24a-25a. Because the evidence showed that Mandel had been bribed to attempt to obtain additional racing days for the other respondents' race track,

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[3] The district court had set aside respondents' racketeering convictions because the predicate acts for those convictions consisted primarily of the mail fraud counts. App., *infra*, 51a-54a. The court of appeals followed suit. *Id.* at 14a-15a.

Judge Hall concluded that justice did not require that their convictions be set aside. *Id.* at 26a.[4]

The government's suggestion of rehearing en banc was denied, with five of the ten judges on the Fourth Circuit dissenting. App., *infra*, 59a.

REASONS FOR GRANTING THE PETITION

As explained more fully in our brief acquiescing in the petition in *Keane* v. *United States*, No. 88-1178, there is considerable confusion in the courts of appeals with respect to the proper standard for granting coram nobis relief.[5] The Seventh Circuit in *Keane* denied coram nobis relief on three alternative grounds, and there is a conflict in the circuits on each of those three grounds. In that circumstance, we believe that review by this Court is warranted.

In our view, *Keane* is a more appropriate candidate for plenary review than this case. The Fourth Circuit here expressly disagreed with the Seventh Circuit's conclusion that a conviction should be upheld on coram nobis review, despite erroneous jury instructions, where the indictment states an offense and the evidence supports a conviction. App., *infra*, 16a-17a. However, the court below did not address either of the Seventh Circuit's alternative theories, which are (1) that an issue cannot be raised pursuant to

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[4] With respect to the government's constructive trust theory and its argument that respondents' scheme to obtain racing days was a scheme to obtain property, Judge Hall noted: "Neither the majority nor the court below found these theories invalid. Rather, both ruled that they were not relevant because the jury was not specifically instructed on them." App., *infra*, 23a. He concluded that respondents' "conduct is still illegal under post-*McNally* law." *Ibid.*

[5] We are serving a copy of our brief in *Keane* on counsel for respondents. We are also serving a copy of our petition in this case on counsel for Keane.

coram nobis when the issue was fully litigated on direct appeal and (2) that a person who suffers no current civil disability as a result of his conviction may not obtain coram nobis relief. In light of the conflicts in the circuits on each issue, we think the Court should consider the full range of questions concerning the standards for granting coram nobis relief, and those questions are all squarely presented in *Keane*.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Keane* v. *United States*, No. 88-1178.

Respectfully submitted.

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APRIL 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 88-7027

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

MARVIN MANDEL, W. DALE HESS, HARRY W. RODGERS, III, WILLIAM A. RODGERS, IRVIN KOVENS, AND ERNEST N. CORY, DEFENDANTS-APPELLEES

Argued July 26, 1988
Decided Dec. 7, 1988

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

WIDENER, Circuit Judge:

The government appeals the granting of a writ of error *coram nobis* vacating the 10-year-old convictions of Marvin Mandel, former governor of Maryland, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens and Ernest N. Cory (petitioners) for mail fraud and racketeering. We affirm the district court's decision which vacated the convictions and required the government to return to the petitioners all fines paid.

On November 24, 1975, a Special Grand Jury for the District of Maryland charged the petitioners in a 24-count

indictment with mail fraud in violation of 18 U.S.C. § 1341 and prohibited racketeering activity in violation of 18 U.S.C. §§ 1961 et seq.[1] The indictment, in essence, charged the petitioners with participating in a mail fraud scheme involving gifts of clothing, jewelry and interests in land to support legislation that would be beneficial to the Marlboro Race Track, which Mandel's codefendants either owned or were interested in.[2]

Specifically, the 20 mail fraud counts of the indictment charged that, beginning between January 7, 1969 and the spring of 1971, and continuing until the filing of the indictment, petitioners devised and intended to devise a scheme and artifice:

> (a) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of MARVIN MANDEL, in his official capacities as Governor of

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[1] 18 U.S.C. § 1962 provides in pertinent part:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity or collection of unlawful debt.

[2] The panel's decision on direct appeal in this case, in some detail in *United States* v. *Mandel,* 591 F.2d 1347, 1353-57 (4th Cir. 1979), sets out the facts which the government alleged constituted the scheme.

the State of Maryland, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud;

(b) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have the state's business and its affairs conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud, and in accordance with the laws and Code of Ethics of the State of Maryland;

(c) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when:

(1) drafting, considering and deliberating upon proposed legislation for the State of Maryland with respect to the Maryland horse racing industry and other matters;

(2) administering the laws of the State of Maryland with respect to the Maryland horse racing industry and to other matters; and

(3) transacting business for and on behalf of the State of Maryland;

(d) To obtain, directly and indirectly, money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts, relating to the Marlboro Race Track, the Bowie Race Track, the Security Investment Company, Ray's Point, Inc., and to other matters.

Count 21 of the indictment charged Mandel with acquiring and maintaining an interest in and control of the Security Investment Company through a pattern of racketeering activity that included mail fraud and bribery under Maryland law.[3] Count 23 charged Hess, Harry Rodgers and William Rodgers with conducting the affairs of the Security Investment Company through a pattern of racketering activity that included bribery and mail fraud. The district court entered a judgment of acquittal on this count and it is not an issue here. Count 24 charged Hess, Harry Rodgers, William Rodgers, Kovens and Cory with conducting and participating in the conduct of the affairs of the Marlboro Race Track through a pattern of racketeering activity that included mail fraud.

Prior to trial, the petitioners moved to dismiss the indictment "arguing, *inter alia,* that the indictment fails to allege a cognizable scheme to defraud . . .," *United States* v. *Mandel,* 415 F. Supp. 997, 1003 (D.Md.1976), in that "the intangible rights allegedly defrauded by the scheme do not constitute 'something of value' whose deprivation can be punished under the mail fraud statute." The motion was denied, and the matter proceeded to trial on June 1, 1977.

The district court instructed the jury on August 9, 1977. The pertinent part of the mail fraud instructions was as follows:

> The words scheme or artifice, as used in the mail fraud statute, mean any plan or course of action intended to defraud others, *or* to obtain money or property by means of false or fraudulent pretenses, representations or promises.

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[3] Count 22 also charged Mandel with engaging in a pattern of racketeering activity, but was dismissed prior to trial. *Mandel,* 591 F.2d at 1352, n.3.

A statement or representation is false or fraudulent within the meaning of this statute if known to be untrue or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.

A false or fraudulent representation may be made by statements or half-truths, or the concealment of material facts, as well as by affirmative statements or acts.

The mail fraud statute prohibits any scheme utilizing the mails that is reasonably calculated to deceive persons of ordinary prudence and comprehension.

A scheme to defraud, within the meaning of the statute, may be defined as the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage or working some injury to something of value held by another.

A citizen's right to have his Government conducted honestly and impartially, and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute.

Additionally, a scheme to defraud public officials of information material to a decision which they are required to make in their official capacity may also come within the meaning of scheme to defraud as used in the mail fraud statute. (Emphasis added)

The petitioners specifically requested, but, upon objection by the government, the court declined to give, an instruction requiring the jury to find a scheme to defraud the State of money or property in order to convict on the mail fraud counts. See *United States* v. *Mandel,* 672 F.Supp. 864, 870 (D.Md.1987).

The petitioners were each adjudged guilty of 15 counts of mail fraud under § 1341 and one count of prohibited

racketeering activity under §§ 1961 et seq.[4] Mandel was sentenced to a four-year prison term; Hess, Harry Rodgers and Kovens were each sentenced to four years' imprisonment and fined $40,000; William Rodgers was sentenced to 20 months' imprisonment and fined $40,000; and Cory was sentenced to 18 months' imprisonment. *Mandel*, 591 F.2d at 1352-53. Additionally, pursuant to 18 U.S.C. § 1963(a), Hess, Harry Rodgers, William Rodgers, Kovens and Cory were ordered to forfeit their ownership interest in the Southern Maryland Agriculture Association, Inc. (the holding corporation of the Marlboro Race Track), based on their convictions under count 24 of the indictment for racketeering. 591 F.2d at 1352, 1353.

Petitioners promptly appealed, claiming, among other things, that their convictions under the mail fraud statute constituted an unwarranted extension of the statute and an impermissible federal intrusion into the political affairs of the State of Maryland. *Mandel*, 672 F.Supp. at 870. Our panel decision found this claim without merit,[5] 591 F.2d at 1358, but held that there had been erroneous admission

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[4] The jury, after 13 days of deliberation, in the middle of which it was given a modified *Allen* charge by the district court, returned verdicts of guilty against the appellees on all but three of the mail fraud counts. The jury returned verdicts of not guilty on counts 5, 6 and 14 (mail fraud) of the indictment. The district court entered judgments of acquittal as to counts 19 and 20 (mail fraud) of the indictment. Additionally, the jury returned verdicts of guilty on counts 21, 23 and 24 (racketeering) of the indictment. The district court entered a judgment of acquittal on count 23 of the indictment. *Mandel*, 591 F.2d at 1352, n.3.

[5] This was in line with earlier opinions of this court. See *United States* v. *Price*, 788 F.2d 234, 237 (4th Cir.1986), *vacated* and *remanded*, *McMahan* v. *United States*, 483 U.S.__, 107 S.Ct. 3254, 97 L.Ed.2d 754 (1987), *on rehearing United States* v. *Price*, 857 F.2d 234 (4th Cir. 1988).

and exclusion of evidence and that the jury instructions on bribery were inadequate with regard to the mail fraud counts, 591 F.2d at 1365. We vacated the convictions and remanded for a new trial. 591 F.2d at 1376. On June 5, 1979, we reheard the matter *en banc*, and an equally divided court affirmed the district court's convictions. *United States* v. *Mandel,* 602 F.2d 653 (4th Cir.1979) (per curiam).[6] Mandel and his codefendants filed a petition for writ of certiorari to the Supreme Court, and it was denied. *Mandel* v. *United States,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980).

All the petitioners have now served their sentences. Mandel served 19 months of his four-year sentence, the remainder being commuted. He also was disbarred because of his federal conviction. 672 F.Supp. at 871. Hess served 18 months of his three-year sentence, the remainder being commuted, and he paid a total of $40,000 in fines. Harry Rodgers and William Rodgers each served their prison terms, three years and a year and a day respectively, and they each paid $40,000 in fines. Kovens served his three-year term and paid a total of $40,000 in fines. Cory's 18-month term of imprisonment was suspended. 672 F.Supp. at 871.

Almost 10 years after petitioners were convicted and more than five years after they completed service of their sentences, the Supreme Court decided *McNally* v. *United States,* 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292

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[6] The entire opinion follows:

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

(1987), holding that the mail fraud statute, 18 U.S.C. § 1341, does not protect against schemes to defraud persons of their intangible rights such as the right to honest government. Based on the Supreme Court's decision in *McNally*, the petitioners filed petitions for writs of error *coram nobis* in the district court in Maryland on August 13, 1987, to vacate their convictions and to require the government to return all fines paid and property forfeited. The district court issued its memorandum opinion and order granting the writs, vacating the petitioners' convictions and ordering that all fines be repaid.[7] From this order, the government took its appeal.

The federal mail fraud statutes were first enacted in 1872 as part of a recodification of the postal laws to protect citizens from the use of the mails in furtherance of schemes to defraud. See *Parr* v. *United States*, 363 U.S. 370, 389 80 S.Ct. 1171, 1182, 4 L.Ed.2d 1277 (1960); *Durland* v. *United States*, 161 U.S. 306, 314, 16 S.Ct. 508, 511-12, 40 L.Ed. 709 (1896). And in the 1970's, the lower federal courts began expanding the scope of the rights protected by § 1341 to include certain intangible rights such as the voters' right to an honest election, *United States* v. *States,* 488 F.2d 761, 765 (8th Cir.1973) *cert. denied,* 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974), the citizens' right to the loyal and faithful services of public officials, *United States* v. *Caldwell*, 544 F.2d 691, 696 (4th Cir.1976), and employers' rights to the loyal and faithful services of their employees, *United States* v. *George*, 477 F.2d 508, 513 (7th Cir.1973), *cert. denied,* 414 U.S. 827, 94 S.Ct. 158, 38 L.Ed.2d 61 (1973). However, the Supreme Court in *McNally*, 483 U.S. 350, 107 S.Ct. 2875,

[7] The district court order did not address petitioners' request that the forfeited property be returned. The parties have since resolved this issue by stipulation.

considerably narrowed the scope of the rights protected by § 1341.

McNally involved a kickback scheme in which James E. Gray, a former Kentucky official, and Charles J. McNally, a private individual, were charged in the indictment with devising a scheme "(1) to defraud the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly or indirectly, money and other things of value by means of false pretenses and the concealment of material facts."[8] *McNally*, 483 U.S. at __, 107 S.Ct. at 2876-77. The indictment alleged that the petitioners and a third individual, Howard P. Hunt, received kickbacks from the State's workers' compensation insurance provider. Hunt was the chairman of the state Democratic Party and had *de facto* control over selecting the insurance agencies from which the State would purchase its policies.

In 1975, the State workers' compensation insurance provider, Wombwell Insurance Company of Lexington, Kentucky, agreed with Hunt to share any commissions in excess of $50,000 a year with other insurance agencies specified by Hunt, including payments to Seton Investment, Inc., which was controlled by Hunt and Gray and nominally owned and operated by McNally. Wombwell also paid commissions to Snodgrass Insurance Agency, which in turn gave money to McNally.

Hunt was charged with, and pleaded guilty to, mail and tax fraud and was sentenced to three year's imprisonment. The jury convicted Gray and McNally of both mail fraud and conspiracy, and the court of appeals affirmed. *United*

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[8] Gray and McNally were also charged with conspiracy to violate the mail fraud statute and conspiracy to defraud the United States by obstructing the collection of federal taxes. *McNally*, 483 U.S. at __, 107 S.Ct. at 2878-80.

States v. *Gray*, 790 F.2d 1290 (6th Cir.1986). The Supreme Court granted certiorari and reversed the court of appeals. It held that § 1341 is "limited in scope to the protection of property rights." *McNally*, 483 U.S. at __, 107 S.Ct. at 2880-82. The Court noted that the jury in *McNally* was not required to find that the State itself was defrauded of any money or property or even that, absent the scheme, the State would have paid lower insurance premiums. Thus, the instructions on the mail fraud count "permitted a conviction for conduct not within the reach of § 1341." Permitting such a conviction, the Court held was error.

The Court rejected the line of courts of appeals' decisions, [*sic*] holding that the mail fraud statute protects against schemes to defraud citizens of their intangible right to honest and impartial government. "The mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." 483 U.S. at __, 107 S.Ct. at 2878-80.

Petitioners argue, and we agree, that this case is indistinguishable from *McNally*, and, thus, the petitioners here were convicted for conduct we now know is "not within the reach of § 1341." 483 U.S. at __, 107 S.Ct. at 2882-84.

The government asserts that the foundation for its mail fraud charge was the bribery of Mandel, and that under its theory of the case the jury necessarily found that Mandel received property in exchange for favorable treatment for the owners of Marlboro.[9] This argument confuses the re-

[9] There is some doubt whether the jury was ever adequately instructed on the *quid pro quo* element of bribery. The Fourth Circuit panel reversed and an equally divided *en banc* court affirmed on this issue. See note 7 and accompanying text. In any event, whether or not the jury was properly instructed on the issue is immaterial, for, in the words of *McNally*," . . . the jury was not required to find that the . . . [State of Maryland] itself was defrauded of any money or property." 483 U.S. at __, 107 S.Ct. at 2880-82.

quirements of the *McNally* decision. *McNally* does not allow a mail fraud conviction merely on the finding that those charged received *any* property in connection with the scheme; *McNally* requires a finding that the scheme *defrauded* or *intended to defraud* someone of money or property. 483 U.S. at __, 107 S.Ct. at 2880-82. As in *McNally*, a conviction here was permitted without a finding that the State was defrauded of money or property, only of the "conscientious, loyal, faithful, disinterested and unbiased services" of Marvin Mandel, in the very words of the indictment, substantially repeated in the jury charge.

In the alternative, the government contends the bribery scheme defrauded the State of Maryland of property under two separate theories. First, the government argues that the State was deprived of the bribes given Mandel, which belonged to the State under a constructive trust theory. Second, the State was deprived of the racing days alloted to the Marlboro Race Track in exchange for the bribes. We recognize that two cases subsequent to *McNally*, in which the juries were instructed on intangible rights, have upheld mail fraud convictions on similar theories. They are *United States* v. *Richerson,* 833 F.2d 1147 (5th Cir.1987), and *United States* v. *Runnels,* 833 F.2d 1183 (6th Cir.1987). Neither of those cases, however, is persuasive here.

Richerson was a conviction of conspiracy to commit mail fraud on account of a kickback scheme in which the defendant, in return for kickbacks, approved false invoices submitted by suppliers to his private employer. The jury was instructed in part, without objection, that the defendant had a duty to his employer not to conceal facts he had reason to believe were material and that such concealment would deprive the employer of the honest and

loyal services of the employee. On appeal, the court affirmed the conviction, giving three alternate grounds. First, it held *McNally* did not apply to cases "involving employee fraud" of a private employer, 833 F.2d at 1147, thereby confining *McNally* to its facts, a scheme to defraud state citizens of their intangible rights to honest and impartial government. As an alternate ground, the court construed the district court's jury instruction as requiring a finding that the defendant breached his duty of loyalty through concealment of material information and held that such concealment affected his employer's property rights. 833 F.2d at 1157. The third alternate ground for affirmance was that, in any event, the error in the charge did not rise to the level of plain error because objection was not taken at trial. 833 F.2d at 1147. None of the grounds for affirmance relied upon in *Richerson* are present here. This is not a case of a private employer; rather, the State of Maryland is involved just as was the Commonwealth of Kentucky in *McNally*. The jury charge given in this case did not require the finding that Mandel breached any duty affecting property rights; rather, it permitted a conviction, in the words of the jury charge, upon a finding that ". . . faithful and loyal service of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute." Plain error also does not enter into this case. Mandel has been making the same *McNally* objection to the indictment and charge in this case, directly or inferentially, ever since he was indicted in 1975.

Runnels was a case of conviction for mail fraud of a local union president, who, for a kickback, would refer workers' compensation claims to an attorney who was also a convicted defendant in the case. The jury charge included an instruction on intangible rights, which the

court of appeals acknowledged was erroneous, 833 F.2d at 1188, thus taking a different tack than the *Richerson* court. It held, however, the the conviction should be affirmed because the jury verdict necessarily demonstrated that the business agent, Runnels, did accept the payments and also because of its legal conclusion that such payments belonged to the union. The court acknowledged that it was affirming a criminal conviction on a theory not properly advanced at trial. 833 F.2d at 1183. *Runnels* also is not persuasive. Whatever the rule may be elsewhere, we hold that in a case in which the jury considers alternate theories of liability, we must reverse the convictions if either theory is an improper basis for punishment. *United States* v. *Mallas,* 762 F.2d 361, 363, n. 3 (4th Cir.1985). The latest application of this rule that we find is in *Mills* v. *Maryland,* __ U.S. __, __, 108 S.Ct. 1860, 1866-67, 100 L.Ed.2d 384 (1988). In order not to apply the rule, we must be able to say "with a high degree of probability" that the jury did not rely on the legally incorrect theory. *United States* v. *Alexander,* 748 F.2d 185, 189 (4th Cir. 1985). Such is not possible in this case, of course. As demonstrated, the jury was quite free, and indeed instructed, to return a guilty verdict solely on the theory that the State of Maryland had been denied the "faithful and loyal services of public officials." This was annunciated by the fact that the bribery instruction offered by the defendants, requiring a finding that the State was defrauded of a money or property interest, was denied by the district court at the government's urging.

Even if the government's theories mentioned just above may be proper subsequent to *McNally*, they are not at issue in this case because the jury was not instructed on them. See *McNally*, 483 U.S. at __, 107 S.Ct. at 2880-84; "Although the Government now relies in part on the asser-

tion that the petitioners obtained property . . . there was nothing in the jury charge that required such a finding." In *Mandel*, there was one theory of the case before the jury which would alone permit conviction, that the State of Maryland and its citizens were defrauded of the honest and faithful services of Mandel, and this was sufficient to convict the petitioners of mail fraud. *Mandel*, 672 F.Supp. at 869. In fact, as we have noted, the court, at the government's urging, specifically rejected an instruction offered by the petitioners requiring for conviction a finding that the State was defrauded of some money or property interest.

Thus, the jury instructions were insufficient and the convictions for mail fraud cannot be upheld under *McNally* standards.[10] Nor may the convictions for racketeering be upheld.

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[10] *Accord*: *United States* v. *Price*, 857 F.2d 234 (4th Cir.1988); *United States* v. *Ochs*, 842 F.2d 515 (1st Cir.1988); *United States* v. *Holzer*, 840 F.2d 1343 (7th Cir.1988); *United States* v. *Murphy*, 836 F.2d 248 (6th Cir.1988); *United States* v. *Gordon*, 836 F.2d 1312 (11th Cir.1988); *United States* v. *Gimbel*, 830 F.2d 621 (7th Cir.1987); see also *United States* v. *Covino*, 837 F.2d 65 (2d Cir.1988).

Carpenter v. *United States*, __ U.S. __, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), is not to the contrary. In *Carpenter*, a reporter for the Wall Street Journal, whose column had an impact on the stock market, conspired with a stock broker for pre-publication release of the column to the broker, which enabled the broker to take advantage of the forthcoming impact of the column on the market. The Court held that the column and the information in it were the property of the Wall Street Journal and that its intangible nature did not make it any less property protected by the mail fraud statute than tangible personal property. It was not the same, the Court decided, as a scheme to defraud citizens of their intangible rights to honest and impartial government. __ U.S. at __, 108 S.Ct. at 320-22. While the Court described the Journal's right to the reporter's honest and faithful service as an interest "too ethereal in itself to fall within the protection of the mail fraud statute," the object of the scheme was to take the Jour-

Count 24 of the indictment, as noted earlier, charged all the petitioners, except Mandel, with violation of the RICO statute premised solely on the mail fraud offenses. Since none of the underlying offenses of mail fraud remain viable after *McNally*, the racketeering convictions under count 24 also must be vacated. See *United States* v. *Truglio*, 731 F.2d 1123, 1132 (4th Cir.1984) *cert. denied,* 469 U.S. 862, 105 S.Ct. 197, 83 L.Ed.2d 130 (1984). While count 21 charged Mandel with criminal violation of RICO premised not only on the mail fraud charges but also on two alleged acts of bribery in violation of Maryland law, it too must be set aside. If one of two predicate offenses underlying a substantive RICO count is vacated, the RICO count also must be vacated. *United States* v. *Joseph*, 781 F.2d 549, 554 (6th Cir.1986). And, since we may not know whether the mail fraud or the bribery charges of Count 21, or both, were considered by the jury, that conviction also must be vacated. See *Mallas*, supra; *United States* v. *Holzer,* 840 F.2d 1343, 1352 (7th Cir.1988).

Based on this analysis, it is clear to us that if this case were before us on direct appeal we would be required to overturn all the convictions. The issue here, however, is whether *coram nobis* relief is appropriate in this case. We think that it is required in order to achieve justice.

In *United States* v. *Morgan,* 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court established that federal courts have the power under the All-Writs Act, 28 U.S.C. § 1651(a) to grant a writ of error *coram nobis* to

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nal's confidential business information, as well as its publication right, intangible property rights, and turn them over without authority to the broker. Thus, the Court distinguished "intangible property rights" from "intangible rights to honest and impartial government." __ U.S. at __, 108 S.Ct. at 320-22.

vacate a conviction after the sentence has been served.[11] The Court held that the extraordinary remedy should be issued, however, "only under circumstances compelling such action to achieve justice." 346 U.S. at 511, 74 S.Ct. at 252. An error "of the most fundamental character" must have occurred to warrant issuing the writ, and no other remedy may be available. We follow the Second Circuit which, in an opinion by Judge Friendly, has specifically allowed the granting of a writ of error *coram nobis* in light of a retroactive dispositive change in the law of mail fraud. *United States* v. *Travers,* 514 F.2d 1171 (2d Cir.1974).

The petitioners in this case have served their sentences. They appealed their cases at each stage of the proceeding. They have no other remedy available other than a writ of error *coram nobis*. Based on the Supreme Court's ruling in *McNally*, the jury instructions in this case improperly allowed petitioners' convictions for acts which are not within the reach of the mail fraud statute.

The government argues, however, that granting a writ of error *coram nobis* is improper where the change in the law did not vitiate the criminality of the petitioners' conduct but only brings into question the propriety of the jury instructions. See *United States* v. *Keane,* 852 F.2d 199 (7th Cir.1988). The government urges that society's interest in the finality of criminal convictions requires us to look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a conviction under post-*McNally* standards. In essence, the government asks this court to review the evidence and decide what a jury would or might have found if the instructions had been proper, or, to put it

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[11] See *Morgan*, 346 U.S. at 507-11, 74 S.Ct. at 250-52, for the history of the development of the writ of error *coram nobis*.

more bluntly, it asks us to convict the defendants of crimes with which they were not charged. This, we decline to do. The sufficiency of the evidence in a case is a question in each instance to be submitted to a jury, subject only to being set aside for insufficiency. *United States* v. *Caudle,* 758 F.2d 994, 997 (4th Cir.1985). We are not organized to decide if the petitioners are bad men or even if they have committed crimes. Our function is to decide whether or not, under the law, they are guilty of the crimes as charged in the indictment, and we decide that they are not.

Petitioners were tried and convicted under § 1341 and, thus, also of prohibited racketeering activities under 18 U.S.C. §§ 1961 *et seq.* for acts the Supreme Court has held are not within the reach of the federal mail fraud statute. Without *coram nobis* relief, the petitioners, who contested their guilt at each stage of the proceeding, would face the remainder of their lives branded as criminals simply because their federal trial occurred before rather than after the Supreme court's ruling in *McNally.*[12] See *Travers,* 514 F.2d at 1178-79.

Accordingly, the district court's granting of the writ and its order that the government return any fines in connection therewith[13] is

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[12] "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Parker* v. *Ellis,* 362 U.S. 574, 593-94, 80 S.Ct. 909, 919-20, 4 L.Ed.2d 963 (1960) (Chief Justice Warren dissenting).

[13] The propriety of the court's order requiring the return of any fines paid in connection with these convictions is not at issue in this case because the government has stipulated that "vacating the criminal convictions would result in restitution of any criminal fines in connection therewith. . . . 672 F.Supp. at 867, n. 2.

AFFIRMED.[14]

K.K. HALL, Circuit Judge, dissenting:

Because the majority misperceives the proper standard of review for writs of error *coram nobis*, and because this misperception leads to an improper result in this case, I must respectfully write in dissent.

I.

I have no quarrel with the majority's rendition of the facts or with its analysis concerning the effect of *McNally* v. *United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), on the substantive law of mail fraud. There is no doubt that were these convictions before this court on direct appeal, they would have to be overturned.

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[14] The dissent deserves two comments.

First, a substantial part of its distinguishing of *United States* v. *Travers*, 514 F.2d 1171 (2d Cir.1974), which is substantially on all fours with our case here, consists of this statement: "Clearly, this is a situation where justice compels issuance of the writ because Travers had committed no crime." Dissenting op. p. 1077. This conclusion by the dissent is contrary to the *Travers* opinion which states that: "Travers, to be sure, engaged in criminal conduct, but not in the crime for which he was convicted." 514 F.2d at 1179.

Second is its reliance on *United States* v. *Keogh*, 391 F.2d 138, 148, (2d Cir.1968), for the reasoning that "The government is simply unlikely to allocate its prosecutorial resources to retry a defendant who will not be resentenced." Dissenting op. p. 1077. That statement from *Keogh* has no application here. The defendant in *Keogh* contested by *coram nobis* admissibility of evidence and procedural irregularities claimed to be of constitutional dimension and would have been tried the second time for the same crime he had been tried and sentenced for the first time around, and which sentence had been served. Here, Mandel, et al, may not be tried for the same crime. The Supreme Court has made that clear in *McNally*.

Thus, the dissent's treatment of the Second Circuit opinions, both of which have bearing on our case, fails in each instance.

However, they are not. Appellants have already fully litigated their positions and have already had the benefit of direct appellant review. *United States* v. *Mandel,* 591 F.2d 1347 (4th Cir.1979) (vacating the convictions and remanding for a new trial); 602 F.2d 653 (4th Cir.1979) (en banc) (reinstating the convictions and affirming the district court), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). This is a collateral attack through the extraordinary means of a writ of error *coram nobis.* The distinction between the review appropriate in these two very different types of proceedings is given wholly inadequate consideration by the majority and although treated more extensively by the court below, is applied incorrectly.

It has been black letter law since the Supreme Court recognized the coram nobis writ in *United States* v. *Morgan,* 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), that a reviewing court should grant the writ "only under circumstances compelling such action to achieve justice." *Id.* at 511, 74 S.Ct. at 252. Coram nobis should be granted only "to correct errors of the most fundamental character where the circumstances are compelling to achieve justice." *Correa-Negron* v. *United States,* 473 F.2d 684, 685 (5th Cir.), *cert. denied,* 414 U.S. 870, 94 S.Ct. 89, 38 L.Ed.2d 88 (1973).

The reason this rigorous burden of proof is placed on a coram nobis petitioner is obvious. All collateral attacks significantly, and detrimentally, impact on society's interest in the finality of criminal convictions.

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration

> of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

United States v. *Addonizio,* 442 U.S. 178, 184 n.11, 99 S.Ct. 2235, 2239-40 n.11, 60 L.Ed.2d 805 (1979) (citations omitted) (habeas corpus); *quoted in United States* v. *Dellinger,* 657 F.2d 140, 144 (7th Cir.1981) (coram nobis); *see also United States* v. *Keane,* 852 F.2d 199, 201 (7th Cir.1988). This impact is amplified in a coram nobis petition. Unlike the habeas situation where there exists a significant incentive for the government to retry a successful petitioner so that he must serve out his sentence, in the coram nobis context,[1] the likelihood of retrial and the corresponding vindication of society's interest in preserving a valid conviction is greatly diminished. *United States* v. *Keogh,* 391 F.2d 138, 148 (2d Cir.1968). The government is simply unlikely to allocate its precious prosecutorial resources to retry a defendant who will not be resentenced. *Id.* Thus, while it is clear that coram nobis and habeas corpus are roughly "similar" proceedings, *United States* v. *Travers,* 514 F.2d 1171, 1173 n.1 (2d Cir.1974); *United States* v. *Little,* 608 F.2d 296, 299 (8th Cir.1979) ("substantially equivalent"), it is even more clear that the burden on a coram nobis petitioner is, and properly should be, greater than that placed on a habeas petitioner. Coram nobis petitions that attempt to overturn convictions in which the petitioner has fully and exhaustively litigated his position should be granted only in the most egregious cases, where circumstances make clear

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[1] My discussion of coram nobis addresses only the situation when the writ is sought after the petitioner's sentence has been served. Obviously, much of my analysis would not apply to writs sought before a petitioner begins to serve his sentence. *See* 3 C. Wright, *Federal Practice and Procedure: Criminal* § 592 at 430 n.15 (1982).

that justice cannot tolerate letting the conviction stand. To grant coram nobis relief more freely would spawn criminal "re"-litigation without end. *Keane, supra,* at 206. Consequently, it is with these considerations in mind that we should review petitioner's convictions.

II.

Four criteria must be met before coram nobis relief is appropriate:

(1) a more usual remedy is not available;

(2) valid reasons exist for not attacking the conviction earlier;

(3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and

(4) the error is of the most fundamental character. *Hirabayashi* v. *United States,* 828 F.2d 591, 604 (9th Cir.1987).

The government concedes that because petitioners have served their sentences, a more usual remedy is not available; that because *McNally* was just recently decided, petitioners could not have contested their convictions any earlier, and, that sufficient adverse consequences remain from petitioners' convictions to create a valid controversy for the purposes of Art. III. Both the court below and the majority have also concluded that the error present in this case is so fundamental that justice compels that these convictions be set aside. Both put great weight on the Second Circuit's decision in *United States* v. *Travers,* 514 F.2d 1171 (2d Cir.1974). Both are mistaken.

In *Travers*, the petitioner was convicted of mail fraud for his involvement in a counterfeit credit card scheme. The *only* actions alleged by the government to have violated 18 U.S.C. §§ 1341, 1342 were the defrauded mer-

chants' mailing of the credit card receipts for the purpose of collecting for the goods and services purchased with the counterfeit cards. After Travers had served his sentence, the Supreme Court decided *United States* v. *Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), holding that such mailings, made after the fraudulent use of the credit card has taken place, are not a part of a fraudulent credit card scheme because they occur after the scheme has reached fruition. *Id.* at 402, 94 S.Ct. at 649. Therefore, the *Travers* court found coram nobis relief appropriate in a case where the intervening change in law left *no* grounds for sustaining the conviction. Clearly, this is a situation where justice compels issuance of the writ because Travers had committed no crime. The *Travers* court expressly recognized this when it acknowledged that "Travers was convicted and punished for an act that the law does not make criminal," and observed that "there was *no* sufficient evidence to support this conviction." *Id.* at 1176, 1178 (quotations omitted) (emphasis added). Plainly, the *Travers* situation is not present here.

The government advances two valid theories as to why petitioners' conduct is criminal even in light of *McNally*. The first posits that the state was deprived of the bribes given Mandel, which rightfully belonged to the State under a constructive trust.[2] At least three circuits have recognized this theory. *United States* v. *Richerson*, 833 F.2d 1147 (5th Cir.1987); *United States* v. *Runnels*, 833 F.2d 1183 (6th Cir. 1987); *Ingber* v. *Enzor,* 841 F.2d 450 (2d Cir.1988). The second contends that the State was deprived of control over the allocation of the racing days that were shifted to the Marlboro Race Track in exchange for the bribes. These racing days are in essence a license to operate a very profitable business that produces signifi-

[2] The total amount received by Mandel has been conservatively estimated at $380,000.

cant revenues for the state.[3] Neither the majority nor the court below found these theories invalid. Rather, both ruled that they were not relevant because the jury was not specifically instructed on them. However, they are relevant, extremely relevant, because this is not a direct appeal. This is a petition for coram nobis relief. If either of these theories is valid, which both are, and if there is sufficient evidence to support the verdict, which there clearly is, then the petitioners are guilty of conduct still illegal under the mail fraud statute.[4] This distinguishes this case from *Travers* and drastically redirects the analysis necessary to overturn these convictions. Because petitioners conduct is still illegal under post-*McNally* law, they complain merely of the improper instructions given at their trial.

Those instructions were clearly faulty in that they allowed for conviction of petitioners without a specific finding that the government was defrauded of a property interest. However, they also described a scheme for which a valid post-*McNally* conviction could he had.[5] Further-

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[3] In 1978, 558 total racing days brought in revenues for the state of Maryland in excess of 20.7 million dollars.

[4] This Court's recent decision in *U.S.* v. *Price,* 857 F.2d 234 (4th Cir.1988), is not to the contrary. There we held only that 18 U.S.C. § 1341 did not protect "intangible rights such as good government or honest union management." *Id.* at 235. No alternate theories of culpability were even discussed, let alone rejected. The Supreme Court's recent decision in *Carpenter* v. *U.S.,* __ U.S. __, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), demonstrates that these alternate theories are completely compatible with *McNally*.

[5] The indictment, which was read to the jury, in part charged:

> (a) *To defraud the citizens of the State of Maryland,* and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties of MARVIN MANDEL, in his of-

more, the evidence presented at trial was more than sufficient to sustain a verdict that the state had been deprived of property. I believe that for coram nobis purposes, this is more than sufficient to sustain these convictions.

The majority rejects this position, citing this Court's decision in *United States* v. *Alexander,* 748 F.2d 185, 189 (4th Cir. 1985), which held that when a jury considers alternate theories of liability, we must reverse the convictions if either theory is invalid unless we can say "with a high degree of probability" that the jury did not rely on the invalid theory. *Id.* at 189. I, of course, agree with this proposition and agree that in this case, a reviewing court could not ascertain with sufficient probability upon which

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ficial capacities as Governor of the State of Maryland, *free from bribery,* corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and *fraud;*

(d) *To obtain, directly and indirectly, money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts,* relating to the Marlboro Race Track, the Bowie Race Trace, the Security Investment Company, Ray's Point, Inc., and to other matters.

Likewise, the instructions also prominently mentioned property:

The words scheme or artifice, as used in the mail fraud statute, mean any plan or course of *action intended to defraud others, or to obtain money or property by means of false or fraudulent pretenses, representations or promises. . . .*

A scheme to defraud, within the meaning of the statute, may be defined as the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage or working some injury to something of value held by another.

Thus, the idea that petitioners had defrauded the state out of property, or a property interest, was presented to the jury. Either of the government's theories, *i.e.* the property lost was the bribe, or the racing days, is compatible with these instructions.

theory the jury relied. However, the tenets of direct appellate review do not apply in an identical fashion on coram nobis proceedings. Our role is not to reverse these convictions if they are in error, but to overturn them only if justice so compels.[6]

The majority characterizes the government's position in this case as an appeal to this Court to "look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a conviction under post-*McNally* standards." Maj.Op. 1075. They rebuke that position as an attempt to ask this Court "to convict the defendants of crimes with which they were not charged." Nothing could be further from the truth. The government is merely asking us to exercise the appropriate level of review, to examine this case as a whole and determine whether the error committed is of such fundamental nature that justice requires us to overturn these convictions.

III.

Marvin Mandel, then governor of Maryland, took bribes totalling at least $380,000 to manipulate the work-

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[6] Writs of coram nobis have traditionally been reserved for situations where there has been a complete breakdown in the legal system. In *Morgan,* the Supreme Court gave an illustrative list of such breakdowns: insanity of a defendant, a conviction on a coerced guilty plea, failure to advise of the right of counsel, prosecutorial misconduct, a conviction based on perjured testimony. *Id.* at 508-10, 74 S.Ct. at 250-52. In fact, *Morgan* involved a 19-year old man who was not advised of his right to counsel and was convicted without any representation. Certainly, *Travers,* where a man was convicted for actions that were not illegal, also fits this mold. *Id.* at 511-12, 74 S.Ct. at 252-53. These are the types of errors that justice compels a court to remedy through coram nobis. An erroneous instruction is simply not in this league, especially when there was manifest evidence present of the petitioners' guilt.

ings of state government, which had been entrusted to him by the people of Maryland, to divert extremely valuable racing days to his cohorts. His motive, their motive, was profit – profit proven to be at the expense of the people of the state of Maryland. Although their trial included an erroneous jury instruction, the proceedings were replete with evidence of bribery and manipulation. Their actions were and are patently illegal. My sense of justice does not compel me to set aside these convictions. Therefore, I must respectfully dissent.[7]

[7] Because I would uphold the mail fraud convictions that are the predicate acts for petitioners' RICO conviction under 18 U.S.C. § 1962, I would affirm the RICO conviction as well.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. MARYLAND

Criminal No. S 75-0822

UNITED STATES OF AMERICA

v.

MARVIN MANDEL, W. DALE HESS,
HARRY W. RODGERS, III, WILLIAM A. RODGERS,
IRVIN KOVENS, AND ERNEST N. CORY

Nov. 12, 1987

MEMORANDUM

SMALKIN, District Judge.

I.

Messrs. Marvin Mandel, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens, and Ernest N. Cory have filed petitions for writs of error *coram nobis* to vacate judgments of conviction and sentence entered against them, and for other and further relief. On October 7, 1977, this Court (Hon. Robert L. Taylor (now deceased), United States District Judge for the Eastern District of Tennessee, sitting by designation) specifically entered judgment of guilt against Mr. Mandel as to counts 1-4, 7-13, 15-18, and 21 of the indictment and against Messrs. Hess, H. Rodgers, W. Rodgers, Kovens, and Cory

as to counts 1-4, 7-13, 15-18, and 24 of the indictment. Counts 1-4, 7-13, and 15-18 of the indictment charged all of the petitioners with mail fraud, in violation of 18 U.S.C. § 1341. Count 21 charged Mr. Mandel with criminal violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, by engaging in a pattern of racketeering activity through 20 acts of mail fraud (charged as separate offenses in counts 1-20) and two acts of bribery in violation of Maryland law. *See* 18 U.S.C. § 1961(1). Count 24 charged the other petitioners herein with criminal violation of RICO, premised solely on the 20 acts of mail fraud set out in counts 1-20. Petitioners now argue that their convictions should be vacated in view of the recent decision in *McNally v. United States,* __ U.S. __, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), wherein the Supreme Court interpreted the federal mail fraud statute as not making punishable schemes to defraud citizens of the intangible right to honest and impartial state government. Petitioners seek the remedy of an extraordinary writ of error *coram nobis,* stating that no other remedy remains available to them.

II.

The writ of error *coram nobis* developed at common law "[t]o relief litigants from judicial wrongs for which there was no remedy. . . ." Annotation, *Writ of Error Coram Nobis,* 38 A.L.R.Fed. 617, 622 (1978). There was some doubt as to whether this ancient writ remained available when 28 U.S.C. § 2255 was enacted in 1948. 3 C. Wright, *Federal Practice and Procedure: Criminal* § 592, at 428 (1982). Just prior to the enactment of § 2255, there was an amendment to Federal Rule of Civil Procedure 60(b) that seemed to have abolished writs of error *coram nobis. Id.* at 428-29. "But in 1954 'the ancient writ of error coram

nobis rose phoenix-like from the ashes of American jurisprudence through the benign intervention of the Supreme Court' in *United States v. Morgan* [346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954)]." *Id.* at 429 (quoting *United States v. Balistrieri,* 606 F.2d 216, 219 (7th Cir.1979), *cert. denied,* 446 U.S. 917, 100 S.Ct. 1850, 64 L.Ed.2d 271 (1980).

In *United States v. Morgan,* 346 U.S. at 506, 74 S.Ct. at 250, the Supreme Court made clear that a federal district court is empowered to issue a writ or error *coram nobis,* pursuant to the All-Writs Act, 28 U.S.C. § 1651(a).[1] Justice Reed, writing for the Court, cautioned, however, that "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy [of writ of error *coram nobis*] only under circumstances compelling such action to achieve justice." *Id.* at 511, 74 S.Ct. at 252. Quite simply, an error "of the most fundamental character" must have occurred, and no other remedy may be available. *Id.* at 512, 74 S.Ct. at 253. Where a petitioner has fully served his prison term for a felony conviction, a writ of error *coram nobis* may issue because, "[a]lthough the term has been served, the results of the conviction may persist." *Id.* "Subsequent convictions may carry heavier penalties, [sic] civil rights may be affected." *Id.* at 512-13, 74 S.Ct. at 253.[2]

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[1] Section 1651(a) provides that "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[2] At this juncture, the Court notes that, through a writ of error *coram nobis,* it may not only vacate a conviction, but it may also order repayment of any fines received by the Government in connection with said conviction. *See United States v. Bluso,* 519 F.2d 473, 475 (4th Cir.1975) (Where defendant's guilty plea was founded upon a

The Second Circuit has found that the limited remedy of *coram nobis* was available in light of a dispositive change in federal law. *See United States v. Travers,* 514 F.2d 1171 (2d Cir.1974). Mr. Travers originally had been convicted of 20 counts of mail fraud and one count of conspiracy to commit mail fraud. Judge Friendly, writing for the Court on the *coram nobis* appeal, explained the facts underlying the original conviction as follows:

> The conspiracy proved at trial was to produce, sell, and distribute counterfeit Diners' Club credit cards. While Travers was present on some occasions when a counterfeit card was used and once even requested use by another of such a card for his benefit, the substantive counts were based on use of the counterfeit cards by a co-conspirator, Pucci, for which Travers could be found guilty under the doctrine of *Pinkerton v. United States,* 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). The mailings were for the purpose of collecting for goods or services already obtained by use of the counterfeit cards.

Id. at 1172. The Second Circuit affirmed Mr. Travers' conviction on direct appeal, rejecting a contention that "the mailings subsequent to use of the cards were not related to the scheme sufficiently to come within the mail fraud statutes. . . ." *Id.* After the Second Circuit's decision on the direct appeal, the Supreme Court accepted a

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constitutional defect, judgment of conviction was vacated, indictment dismissed, and Government ordered to repay portion of fine that it had received.); *DeCecco v. United States,* 485 F.2d 372, 373-74 (1st Cir.1973) (By way of a *coram nobis* proceeding, the Court vacated defendant's unconstitutional conviction under the Wagering Tax statute and ordered repayment of fine paid pursuant to judgment of conviction under said statute.). The Government, indeed, has stipulated that "vacating the criminal convictions would result in restitution of any criminal fines in connection therewith. . . ." Paper # 640, at 56 n. 19.

like contention in the case of *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974). In reliance on the *Maze* case, Mr. Travers, who had fully served his sentence, "petitioned the district court for a writ of error *coram nobis,* requesting that his conviction be vacated and his record expunged." The district court dismissed the petition, stating that Mr. Travers had asserted no adverse legal consequences. *Id.* The Second Circuit ultimately held that, even though Mr. Travers had fully served his sentence, he was entitled to a writ of error *coram nobis* in that he was "convicted and punished for an act that the law does not make criminal." *Id.* at 1176. It is the contention of petitioners that they, too, are entitled to a writ of error *coram nobis,* in that they were "convicted and punished for an act that the law does not make criminal." *See, e.g.,* Paper # 630, at 33. The Government, implicitly acknowledging that conviction for conduct that is not criminal may be grounds for issuance of a writ of error *coram nobis,* merely retorts that "the conduct for which defendants were indicted and convicted constitutes mail fraud, even under a post-*McNally* interpretation of the mail fraud statute." Paper # 640, at 20.

The question now before this Court on petitioners' motions is whether circumstances compelling an extraordinary writ of error *coram nobis* (like the circumstances in the *Travers* case) are present here. An in-depth review of the procedural history of this case as well as of the newly-emergent case law on the federal mail fraud statute (predominately *McNally*), therefore, is in order.

III.

On November 24, 1975, a Special Grand Jury for the District of Maryland returned a twenty-four count indictment charging petitioners with violations of 18 U.S.C.

§ 1341, *i.e.*, the federal mail fraud statute, and 18 U.S.C. § 1961 *et seq.*, *i.e.*, RICO. Specifically, Messrs. Mandel, Hess, H. Rodgers, W. Rodgers, Kovens, and Cory were charged with mail fraud in each of the first 20 counts of the indictment; in counts 21 and 22, Mr. Mandel was charged with RICO violations, based on the 20 alleged violations of the mail fraud statute and two alleged violations of the Maryland briberty statute (Md.Ann.Code art. 27, § 23 (1957)); in count 23, Messrs. Hess, H. Rodgers, and W. Rodgers were charged with a RICO violation, based on 20 alleged violations of the mail fraud statute and two alleged violations of the Maryland bribery statute; and, in count 24, Messrs. Hess, H. Rodgers, W. Rodgers, Kovens, and Cory were charged with a RICO violation based solely on 20 alleged violations of the mail fraud statute.

Count 1 (paragraph 13) of the indictment sets forth the gist of the alleged scheme to defraud with which petitioners herein were charged:

> Beginning at some point between the 7th day of January, 1969, and the spring of 1971, and continuing thereafter to the date of the filing of this Indictment, in the State and District of Maryland and elsewhere,
>
> MARVIN MANDEL
> W. DALE HESS
> HARRY W. RODGERS, III
> WILLIAM A. RODGERS
> IRVIN KOVENS
> and
> ERNEST N. CORY
>
> the defendants herein, devised and intended to devise a scheme and artifice:

(a) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to the conscientious, loyal, faithful, disinterested and unbiased services, actions and performance of official duties by MARVIN MANDEL, in his official capacities as Governor of the State of Maryland, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, official misconduct and fraud;

(b) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have the state's business and its affairs conducted honestly, impartially, free from bribery, corruption, bias, dishonesty, deceit, official misconduct and fraud, and in accordance with the laws and Code of Ethics of the State of Maryland;

(c) To defraud the citizens of the State of Maryland, and its governmental departments, agencies, officials and employees, both executive and legislative, of their right to have available and to be made aware of all relevant and pertinent facts and circumstances when:

(1) drafting, considering and deliberating upon proposed legislation for the State of Maryland with respect to the Maryland horse racing industry and to other matters;

(2) administering the laws of the State of Maryland with respect to the Maryland horse racing industry and to other matters; and

(3) transacting business for and on behalf of the State of Maryland;

(d) To obtain, directly and indirectly money, property and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of material facts, relating to the Marlboro Race Track, the Bowie Race Track, the Security Investment Company, Ray's Point, Inc., and to other matters.

Counts 2-20, having incorporated by reference the above-quoted allegations of count 1, charged petitioners herein with particular mailings in the execution of the alleged scheme and artifice to defraud. As previously noted, each of the RICO counts was based in whole or in part on alleged acts of mail fraud.[3]

The reach of the federal mail fraud statute as relied upon in count 1 has been consistently challenged by petitioners at various stages of the proceeding.

In November, 1975, petitioners (the defendants) moved to dismiss the indictment, "arguing, *inter alia,* that the indictment fails to allege a cognizable scheme to defraud. . . ." *United States v. Mandel,* 415 F.Supp. 997, 1003 (D.Md.1976). They specifically argued that "the indictment fails to allege a scheme to defraud because (1) the facts alleged in the indictment reveal no intentional use of false or fraudulent representations by any of the defendants and (2) the intangible rights allegedly defrauded by the scheme do not constitute 'something of value' whose deprivation can be punished under the mail fraud statute." *Id.* at 1005-06. Judge Murray first found that it was evident that the indictment alleged the intentional use of fraudulent representations by the defendants. *Id.* at 1010. He next found that the indictment alleged a scheme to defraud within the meaning of the mail fraud statute, *id.* at 1015, stating:

[3] Count 22 was dismissed prior to trial and need not be further discussed here.

> The mail fraud statute makes unlawful the use of the mails in execution of "*any* scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1341 (emphasis added). A logical interpretation of that language is that Congress, by expressly limiting the second clause to money or property, did not limit "any scheme or artifice to defraud" to those which contemplated the gaining of money or property, and courts have so construed it. *See, e.g., United States v. States,* 488 F.2d 761, 764 (8th Cir.1973), *cert. denied,* 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974).

Id. at 1010. This matter thus proceeded to trial on June 1, 1977.

On August 9, 1977, Judge Taylor instructed the jury. The pertinent part of the mail fraud charge was as follows:

> The words scheme or artifice, as used in the mail fraud statute, mean any plan or course of action intended to defraud others, *or* to obtain money or property by means of false or fraudulent preteneses, representations, or promises.
>
> A statement or representation is false or fraudulent within the meaning of this statute if known to be untrue or made with reckless indifference as to its truth or falsity, and made or caused to be made with the intent to deceive.
>
> A false or fraudulent representation may be made by statements or half-truths, or the concealment of material facts, as well as by affirmative statements or acts.
>
> The mail fraud statute prohibits any scheme utilizing the mails that is reasonably calculated to deceive persons of ordinary prudence and comprehension.

> A scheme to defraud, within the meaning of the statute, may be defined as the intentional use of false or fraudulent representations for the purpose of gaining a valuable undue advantage or working some injury to something of value held by another.
>
> *A citizen's right to have his Government conducted honestly and impartially, and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute.*
>
> *Additionally, a scheme to defraud public officials of information material to a decision which they are required to make in their official capacity may also come within the meaning of scheme to defraud as used in the mail fraud statute.*

Transcript at 11488-89 (emphasis added). The Court declined to give the following jury instruction as to mail fraud requested by defendants, and exception was duly taken (Tr. 11562):

> The words "scheme" and "artifice", as used in the mail fraud statute, include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises *money or property* from persons so deceived.
>
> It is an essential element of the offense of mail fraud that the defendant intend to inflict *some definable pecuniary, financial, or economic harm* upon the persons or class of persons alleged in the indictment to be victims of the scheme. *In the present case, therefore, unless you find, beyond a reasonable doubt, that the Defendant Mandel intended to inflict some definable pecuniary, financial, or economic harm upon the citizens of the State of Maryland,*

through the acts which he is alleged to have committed or intended, you must find him not guilty.

Paper # 631, Exhibit D (emphasis added).

The Court's instructions as to "pattern of racketeering activity" in connection with counts 21, 23, and 24, the criminal RICO counts, also merit reproduction. With respect to count 21, the Court instructed that the Government must prove that Mr. Mandel "acquired or maintained such interest in or control of said enterprise through a pattern of racketeering activities; that is through two or more acts constituting bribery under Maryland law *or* mail fraud under Federal law . . . occurring within ten years of each other and connected by a common plan, scheme or motive." Transcript at 11508 (emphasis added). The Court gave the identical instruction (except that it was tailored to Messrs. Hess, H. Rodgers, and W. Rodgers) with respect to count 23. With respect to count 24 (implicating Messrs. Hess, H. Rodgers, W. Rodgers, Kovens, and Cory), the Court instructed that the Government must prove that the individual defendants "in the course of such association or employment conducted or participated in the conduct of the affairs of said enterprise through a pattern of racketeering activities; that is through two or more acts constituting mail fraud . . . occurring within ten years of each other and connected by a common plan, scheme, or motive." Transcript at 11510.

After a dozen days of deliberation, the jury returned its verdict. Mr. Mandel was convicted on counts 1-4, 7-13, and 15-18 alleging mail fraud and count 21 alleging RICO based on mail fraud or bribery. Messrs. Hess, H. Rodgers, W. Rodgers, Kovens, and Cory were convicted on the aforementioned mail fraud counts and count 24 alleging RICO premised solely on mail fraud.[4]

[4] The jury had found Messrs. Hess, H. Rodgers, and W. Rodgers guilty, additionally, as to count 23 alleging RICO through mail fraud

Petitioners promptly appealed their convictions. Petitioners first contended that their prosecution and conviction under the mail fraud statute constituted an unwarranted extension of that statute and an impermissible federal untrusion [*sic*] into the political affairs of the State of Maryland. *United States v. Mandel,* 591 F.2d 1347, 1357 (4th Cir.), *vacated,* 602 F.2d 653 (4th Cir.) (en banc), *second reh. en banc denied,* 609 F.2d 1076 (4th Cir. 1979), *cert. denied,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980). The Fourth Circuit panel opinion reported in 591 F.2d held that "the claim that prosecution under § 1341 constitutes an impermissible federal intrusion into the political affairs of the State of Maryland and thus violates principles of federalism is without merit," *id.* at 1358, and that "[the] contention that their convictions were based on an unwarranted overextension of the mail fraud statute is likewise without merit." *Id.* at 1359. Petitioners further contended that the jury was inadequately charged by the Court on the mail fraud counts. *Id.* at 1364. They specifically "attack[ed] the district court's failure to give a bribery instruction in connection with the mail fraud counts as well as the failure to give an instruction relating to Governor Mandel's knowledge of the ownership of Marlboro." *Id.* at 1364-65. The majority of the Fourth Circuit panel, *viz.,* Judges Widener and Russell, agreed that the district court's instructions were not adequate. *Id.* at 1365-66. The majority additionally held that certain evidence was admitted improperly. *Id.* at 1367-71. Judge Butzner dissented on all grounds that the majority thought constituted reversible error. *Id.* at 1377-87. the judgments of conviction as to the mail fraud counts thus were vacated,

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or bribery. The Court, however, entered a judgment of acquittal on that count, finding that the RICO statute requires some involvement in the operation or management of an enterprise and that the Government's evidence had not met this requirement.

as were the judgments of conviction as to the remaining racketeering counts (counts 21 and 24), given that "they depend[ed] in whole or in part upon the mail fraud convictions." *Id.* at 1376. The Fourth Circuit, in the same opinion, affirmed the judgment of acquittal on count 23. *Id.* at 1374-76.

On June 5, 1979, the Fourth Circuit reheard the matter *en banc*. *United States v. Mandel,* 602 F.2d 653 (4th Cir.1979) (*per curiam*). The resulting opinion, in its entirety, follows:

> The judgments of conviction are affirmed by an equally divided court.
>
> A majority of the members of the *en banc* court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division.

Id. Judge Widener dissented, writing, in relevant part, that:

> The prosecution rests on fragmented circumstances, many of the more essential ones being no more than mere rumor and legislative corridor gossip. In such a case, is not a defendant entitled to precise instructions? What was done here was, however, more likely to confuse and mislead than to provide clear guidance for the jury. And that should entitle the defendants to a new trial. The error is not insubstantial; it is fundamental. . . .
>
> The additional remarks that I have made as to the sufficiency of the jury instructions should be read in light of the fact that *the panel opinion carried the mail fraud statute near its outer limits, and some cases may arguably indicate beyond.* . . .

Id. at 655-56 (Widener, J., dissenting) (emphasis added).

Messrs. Mandel *et al.* filed a petition for writ of *certiorari* to the Supreme Court of the United States, which was denied. *Mandel v. United States,* 445 U.S. 961, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980).

In the intervening years since last they were before this Court, petitioners have served their prison sentences. Mr. Mandel served 19 months of his four-year sentence, the remainder being commuted. He was disbarred by this Court on July 9, 1980, and by the Court of Appeals of Maryland on October 28, 1982, because of his federal convictions. Mr. Hess served 18 months of his three-year term of imprisonment, the remainder having been commuted, and he paid a total of $40,000 in fines. Messrs. H. and W. Rodgers each served their terms of imprisonment, three years and one year and a day, respectively, and they each paid $40,000 in fines. Mr. Kovens served his three-year term of imprisonment and paid a total of $40,000 in fines. Mr. Cory's 18 month term of imprisonment was suspended.

IV.

Within this calendar year, the Supreme Court narrowed the scope of the federal mail fraud statute as it had been interpreted theretofore by the inferior federal courts. The case is *McNally v. United States,* __ U.S. __, 107 S.Ct. 2875, 97 L.Ed 2d 292 (1987). The pertinent facts were as follows: Gray, a former Kentucky official, and McNally, a private individual, were charged with one count of conspiracy and seven counts of mail fraud, six of which were dismissed before trial. The remaining mail fraud count alleged that Gray and McNally had devised a scheme "(1) to defraud the citizens of government of Kentucky of their right to have the Commonwealth's affairs conducted honestly, and (2) to obtain, directly and indirectly, money

and other things of value by means of false pretenses and the concealment of material facts." *Id.* 107 S.Ct. at 2878. The conspiracy count alleged that Gray and McNally had "(1) conspired to violate the mail fraud statute through the scheme just described and (2) conspired to defraud the United States by obstructing the collection of federal taxes." *Id.*

After informing the jury of the essence of the remaining counts, the District Court instructed the jury that the alleged scheme or artifice to defraud the citizens of Kentucky and to obtain money by false pretenses could be made out by either of two sets of findings:

> (1) that Hunt had *de facto* control over the award of the workmen's compensation insurance contract to Wombwell from 1975 to 1979; that he directed payments of commissions from this contract to Seton, an entity in which he had an ownership interest, without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure; and that petitioners, or either of them, aided and abetted Hunt in the scheme; or (2) that Gray, in either of his appointed positions, had supervisory authority regarding the Commonwealth's workmen's compensation insurance at a time when Seton received commissions; that Gray had an ownership interest in Seton and did not disclose whose actions or deliberations could have been affected by that disclosure; and that McNally aided and abetted Gray (the latter finding going only to McNally's guilt).

Id. at 2879. The jury was not instructed that "the Commonwealth itself was defrauded of any money or property;" or that "in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured

better insurance;" or that "to convict it must find that the Commonwealth was deprived of control over how its money was spent."[5] *Id.* at 2882. The jury convicted Gray and McNally on both the conspiracy count and the remaining mail fraud count. *Id.* at 2879. The Sixth Circuit subsequently affirmed, relying on a line of decisions, exemplified by *United States v. Mandel,* holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government. *Id.* The Supreme Court reversed the Sixth Circuit, holding that the jury charge permitted a conviction for conduct outside the reach of the mail fraud statute, 18 U.S.C. § 1341. *Id.* at 2882. The Court further held that, because the substantive mail fraud convictions were reversed, the conspiracy convictions should also be reversed.

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[5] As pointed out in a footnote to the majority opinion, it additionally was not charged that requiring the Wombwell agency to share commissions violated state law. The Court stated that it therefore should not assume that said requirement was illegal under state law. The Court continued that "[f]or the same reason we should assume that it was not illegal under state law for Hunt and Gray to own one of the agencies sharing in the commissions and hence to profit from the arrangement, whether or not they disclosed it to others in state government." The concluding paragraph of this footnote, which is obviously *dicta*, reads:

> It may well be that Congress could criminalize using the mails to further a state officer's efforts to profit from governmental decisions he is empowered to make or over which he has some supervisory authority, even if there is no state law proscribing his profiteering or even if state law expressly authorized it. But if state law expressly permitted or did not forbid a state officer such as Gray to have an ownership interest in an insurance agency handling the State's insurance, it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the State and is forbidden under federal law.

Id. at 2882 n. 9.

Id. Justice White, writing for the Court, began his discussion by stating that, "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *Id.* at 2879. Justice White explained that, "[i]nsofar as the sparse legislative history reveals anything, it indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money and property." *Id.* He then addressed the case law interpreting § 1341, stating that *Durland v. United States,* 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896), "the first case in which this Court construed the meaning of the phrase 'any scheme or artifice to defraud,' held that the phrase is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach." *Id.* 107 S.Ct. at 2879-80. According to Justice White, "Congress codified the holding of *Durland* in 1909, and in doing so gave further indication that the statute's purpose is protecting property rights." *Id.* at 2880. Justice White ultimately concluded for the Court that, "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights." *Id.* at 2881.

In reliance on its holding in *McNally,* the Supreme Court recently vacated another judgment of conviction for mail fraud based on intangible rights. *McMahan v. United States,* __ U.S. __, 107 S.Ct. 3254, 97 L.Ed.2d 754 (1987), *vacating United States v. Price,* 788 F.2d 234 (4th Cir. 1986). In the *Price* case, the Fourth Circuit had held that the allegations in an indictment (and evidence in support thereof) "that [defendant union officials] devised a scheme to defraud the union of their 'faithful and honest serv-

ices,' " and that the mails were used in furtherance of the scheme were sufficient to support defendants' mail fraud convictions. *Price*, 788 F.2d at 236-37.

The various circuit courts of appeal have begun to change their prior interpretations of the mail fraud statute in view of *McNally* and *McMahan*. *See, e.g., United States v. Gimbel,* 830 F.2d 621, 626 (7th Cir.1987) (The Seventh Circuit reversed Gimbel's conviction for mail and wire fraud where the indictment underlying the conviction merely stated that "the 'scheme' consisted of depriving the Treasury Department of Currency Transaction Reports and of other 'accurate and truthful information and data.' ").

Based on *McNally* and its progeny, it is indisputably settled that the federal mail fraud statute does not now make criminal, nor has it ever made criminal, the use of the mails in furtherance of schemes or artifices to defraud persons of non-property rights.[6] Because the Supreme Court was interpreting the statute in light of its legislative history and intent, obviously static properties of the statute, the reach of the statute has logically been as narrow as *McNally*'s interpretation since the day of its enactment. *See* Part VI, *post*.

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[6] Contrary to the Government's position in apparent reliance on *McNally*'s footnote 9, *McNally* does not stand for the limited proposition that "a scheme to deprive a state solely of intangible rights, such as the right to have its affairs conducted honestly *that does not violate state law* falls outside the scope of the mail fraud statute." Paper # 640, at 1-2 (emphasis added). Nothing in footnote 9 so limits the *McNally* holding. The Court merely observed in that footnote that no violation of state law was charged or would be assumed, and speculated as to what Congress may, but has not yet, criminalized.

V.

It is entirely settled that there is no federal common law of crimes. That is, criminal conduct does not offend against the federal government unless it violates an Act of Congress. *See, e.g., Jerome v. United States,* 318 U.S. 101, 104, 63 S.Ct. 483, 485, 87 L.Ed. 640 (1943); *United States v. Pardee,* 368 F.2d 368, 374 (4th Cir.1966). "One may be subjected to punishment for crime in the federal courts only for the commission or omission of an act defined by statute, or by regulation having legislative authority, and then only if punishment is authorized by Congress." *Viereck v. United States,* 318 U.S. 236, 241, 63 S.Ct. 561, 563, 87 L.Ed. 734 (1943) (citing, *e.g., United States v. Standard Brewery, Inc.,* 251 U.S. 210, 219-20, 40 S.Ct. 139, 141, 64 L.Ed. 229 (1920); *United States v. George,* 28 U.S. 14, 20-22, 33 S.Ct. 412, 414-15, 57 L.Ed. 712 (1913); *Williamson v. United States,* 207 U.S. 425, 453-62, 28 S.Ct. 163, 173-77, 52 L.Ed. 278 (1908)). The federal judiciary therefore "may not create crimes outright or enlarge the reach of enacted crimes." *United States v. Best,* 573 F.2d 1095, 1101 (9th Cir.1978) (citing *Morissette v. United States,* 342 U.S. 246, 263, 72 S.Ct. 240, 249-50, 96 L.Ed. 288 (1952)). As the Supreme Court stated in *Viereck,* 318 U.S. at 243, 63 S.Ct. at 564, "[t]he unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving his conduct may seem." In plain English, if petitioners' conduct was not prohibited by § 1341, it was not a federal crime.

VI.

Petitioners have recognized that a question might arise "as to the degree of retroactivity to be attached to the

McNally decision." Paper # 631, at 31. Based on *Davis v. United States,* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974), and its progeny, they argue that *McNally* should be given full retroactive effect so as to permit this collateral attack on their convictions. *See, e.g.,* Paper # 631, at 31-33; Paper # 633, at 21-25. The Government opposes petitioners' argument, stating that, "[w]hatever the retroactivity of *McNally* as a general matter, this Court should not apply it retroactively in the narrow circumstances of this case, where the conduct charged and proven [sic] violated the mail fraud statute, the jury instructions followed a universal interpretation of the mail fraud statute before *McNally,* and defendants long ago completed service of their sentences." Paper # 640, at 41.

In this Court's view, petitioners and the Government alike address not one, but two distinct, yet interrelated, issues, *viz.,* the general availability of collateral relief to address a change in the law and the specific retroactive effect to be given *McNally* in this case. The following discussions relates to the first issue. The Supreme Court held in *Davis,* 417 U.S. at 341-42, 94 S.Ct. at 2302-03, that a conviction may be collaterally attacked, by way of a 28 U.S.C. § 2255 motion, if a non-constitutional change in the law has been made since trial and appeal. The logic of the *Davis* opinion applies with equal force to petitions for writ of error *coram nobis* based on non-constitutional changes in the law after trial and appeal. *See United States v. Travers,* 514 F.2d 1171, 1173 n. 1 (2d Cir.1974) ("Although the Davis case arose under 28 U.S.C. § 2255 the standards applied in federal *coram nobis* are similar."); *cf.* 3 C. Wright, *Federal Practice and Procedure: Criminal* § 592, at 433 (Habeas corpus rules are highly persuasive in deciding how *coram nobis* proceedings should be conducted.).

With the question of the propriety of seeking *coram nobis* relief based on a non-constitutional change in the law decided, the focus next becomes whether *McNally* is to be applied retroactively to this case. There is persuasive authority to the effect that a Supreme Court decision construing the mail fraud statute as not reaching a particular scheme to defraud is fully retroactive. *See Strauss v. United States,* 516 F.2d 980 (7th Cir.1975) (habeas corpus); *United States v. Travers,* 514 F.2d 1171 (2d Cir. 1974) (writ of error *coram nobis*). The backdrop to these cases was the Supreme Court's decision in *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 645, 38 L.Ed.2d 603 (1974), that § 1341, the mail fraud statute, does not reach certain credit card schemes to defraud. The courts deciding both the *Strauss* and *Travers* cases permitted collateral attack on pre-*Maze* mail fraud convictions in light of *Maze.* They explained, quite simply, that "Section 1341 [the mail fraud statute] has always had the meaning given it by the Supreme Court in *Maze.*" *Strauss v. United States,* 516 F.2d at 983 (citing *United States v. Travers,* 514 F.2d at 1174 n.4). Judge Friendly, writing for the Second Circuit in *Travers,* addressed the argument the Government made there, and also makes here, that a Supreme Court decision is merely an overruling one where it changes "the law of the circuit," stating:

> Reliance on the quoted expression of rather recent vintage, which is only a shorthand way of saying that the views of the court of appeals on an issue of federal law may remain undisturbed for a long time, can lead to dangerously wrong results. There are not eleven omni-presences of federal law brooding over various portions of the United States. In the long run there is only one although some time may be needed to reveal it.

United States v. Travers, 514 F.2d at 1174 n. 4.

Interestingly, these two appellate decisions retroactively applying a Supreme Court decision construing the mail fraud statute do not discuss whether or how long ago defendants' sentences had been served before collateral relief was sought.

The Supreme Court expressly held in *McNally* that § 1341, the mail fraud statute, has been limited from its inception to the protection of money and property (rather than non-monetary, *i.e.*, "honest and faithful government") rights. *McNally v. United States,* 107 S.Ct. 2875 *passim. McNally* is *not* an overruling decision, despite "law of the circuit" to the effect that § 1341, the mail fraud statute, protects both tangible and intangible rights. *Cf. United States v. Travers,* 514 F.2d at 1174 n. 4. Retroactive application of *McNally,* therefore, is required.[7]

VII.

A.

Given the recent, retroactive decision in *McNally v. United States,* together with the nonexistence of any fed-

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[7] In the context of a § 2255 proceeding, the Southern District of New York has held that *McNally* applies retroactively, requiring the settling aside of proscribed mail fraud convictions. *Ingber v. Enzor,* 664 F.Supp. 814, 823 (S.D.N.Y. 1987). When presented with a petition for writ of error *coram nobis* to vacate the mail fraud convictions filed in reliance on *McNally*, the Eastern District of Pennsylvania (per Senior Judge Van Artsdalen) wrote in *dictum* that "[n]othing in *McNally* suggests that its doctrine should be made applicable to final judgments." *United States v. Osser*, No. 72-384, slip op. at 8 (E.D.Pa. Oct. 7, 1987) [Available on WESTLAW, DCT database]. Judge Van Artsdalen, at one point, characterized *McNally* as "overturning a long and consistent line of lower court decisions. . . ." *Id.* at 4. This Court finds itself in agreement with the views of the Southern District of New York rather than the Eastern District of Pennsylvania on this point, especially because the latter court's statement was *dictum.*

eral common law of crimes, it is clear that intangible rights to good and honest government may *not* be the target of a criminal scheme to defraud under the federal mail fraud statute, 18 U.S.C. § 1341. It is similarly clear that the jury charge in *Mandel* permitted conviction for mail fraud premised on a deprivation of intangible rights, *i.e.*, the right of a state's citizens to honest and faithful government, explicitly disapproved in *McNally,* and the right of public officials to receive accurate information material to a decision, implicitly disapproved in *McNally*. The charge given here did not *require* for conviction that the United States prove that the citizens of Maryland or its public officials suffered any economic loss or injury as a result of petitioners' conduct. Indeed, Judge Taylor *declined* to give a requested instruction that would have required that the Government prove loss of money or property by the citizens flowing from petitioners' "scheme to defraud," just as the trial judge in *McNally* had denied such an instruction.[8]

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[8] In a summarizing instruction on mail fraud, Judge Taylor used conjunctive language linking the theories of deprivation of good government and material information to the obtaining "directly and [sic] indirectly, [of] money, property, and other things of value by means of false and fraudulent pretenses, representations and promises and the concealment of material facts relating to the Marlboro and Bowie Race Tracks, Security Investment Company, [and] Ray's Point, Inc. . . ." Tr. 11552-53. Applying the well-settled principle that instructions must be viewed as a whole, rather than in isolated sentences, *see, e.g., United States v. Lopez*, 611 F.2d 44, 47 (4th Cir.1979), this isolated sentence does not alter the fact that the instructions as a whole permitted mail fraud convictions to be entered without a finding that any person was deprived of a property right. The mere fact that the schemers would eventually obtain profits from the scheme does not establish that they ever intended to deprive someone else of that person's property. One can profit either at, or not at, the expense of others. It is only the former that is prohibited in the mail fraud context by *McNally*, and the instruction excerpt quoted

Petitioners thus were convicted of using the mails to defraud citizens and public officials of intangible, nonmonetary rights—conduct which has never been made criminal by federal statute. This Court, then, has no choice but to grant a writ of error *coram nobis* that, at the very least, vacates the mail fraud convictions of Messrs. Mandel, Hess, H. Rodgers, W. Rodgers, Kovens, and Cory. Whether the RICO convictions under counts 21 and 24 of the indictment also must be vacated by the writ remains to be addressed.

B.

It is clear that if convictions for all of the predicate offenses underlying a substantive RICO count are vacated, then conviction for the substantive RICO count also must be vacated. *See United States v. Truglio,* 731 F.2d 1123, 1132 (4th Cir.1984). It additionally appears to be the case that, if conviction for even *one* of the predicate offenses underlying a substantive RICO count is vacated, the substantive RICO count must be vacated. *See United States v. Joseph,* 781 F.2d 549, 554 (6th Cir.1986). In the *Joseph* case, the Sixth Circuit reversed a conviction for attempting to collect extensions of credit by extortionate means, *one* of the offenses relied on in convicting defendant of a substantive RICO violation; it then felt compelled to reverse the substantive RICO conviction. *Id.* The aforementioned RICO conviction apparently could not stand because a "pattern of racketeering activity" was lacking. *See Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985); *see also International Data Bank, Ltd. [IDB] v. Zepkin,* 812 F.2d 149 (4th Cir.1987).

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above did not make this crucial distinction, either standing alone or in context with the other instructions.

Count 24, as noted throughout, charges all petitioners save Mr. Mandel with criminal violation of RICO premised solely on predicate offenses of mail fraud. Because none of the predicate offenses underlying this substantive RICO offense remains viable in the wake of *McNally,* the requisite "pattern of racketeering activity" necessarily is lacking. The Court, in granting the writ of error *coram nobis,* therefore additionally will vacate the RICO convictions of Messrs. Hess, H. Rodgers, W. Rodgers, Kovens, and Cory.

The only question remaining is whether Mr. Mandel's conviction for criminal violation of RICO, premised not only on the 20 counts of mail fraud but also on two alleged acts of bribery in violation of Maryland law, similarly must be set aside. Because there was no punishable mail fraud, the requisite RICO "pattern of racketeering activity" obviously could not be established by the alleged acts of mail fraud or a combination of any one or more of these acts with one or both of the acts of bribery. That is, for the RICO conviction to stand, the "pattern of racketeering activity" requirement must have been satisfied exclusively and independently by the two alleged violations of the Maryland bribery statute outlined in the indictment and explained to the jury. The pertinent part of the indictment reads as follows:

> (1) that on or about January 1, 1972, MARVIN MANDEL, while Governor of the State of Maryland, did receive from W. Dale Hess, Harry W. Rodgers, III, and William A. Rodgers a financial interest of substantial value in the Security Investment Company as a bribe, fee and reward for the purpose of influencing him in the performance of his official duties and for neglecting and railing [sic] to perform the same; and

> (2) that on or about December 6, 1971, MARVIN MANDEL, while Governor of the State of Maryland, did receive from W. Dale Hess, Harry W. Rodgers, III, and William A. Rodgers a 15% interest in certain assets later formally acquired by Ray's Point, Inc. as a bribe, fee and reward for the purpose of influencing him in the performance of his official duties, and for neglecting and failing to perform the same.

Indictment, Count 21, at ¶ 4(b).

Receipt of these two alleged bribes, *i.e.*, a financial interest in the Security Investment Company and a 15% interest in assets later acquired by Ray's Point, Inc., both within less than a two-month period, arguably does not show the "continuity plus relationship" characteristic of a "pattern of racketeering activity"—an essential element of a RICO violation. *See Sedima; IDB.*

Even if the two alleged bribes satisfied the RICO "pat tern" requirement, the Court could not allow Mr. Mandel's conviction for criminal violation under count 21 of the indictment to stand. In the oft-cited decision of *Stromberg v. California,* 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931), the Supreme Court vacated a conviction for violation of a statute condemning display of a red flag in a public place or a meeting place (1) "as a sign, symbol or emblem of opposition to organized government" or (2) "as an invitation or stimulus to anarchistic action" or (3) "as an aid to propaganda that is of a seditious character." Justice Hughes, writing for the Court, explained that:

> The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury [was] instructed that [its] verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause

> of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. . . . It follows that instead of its being permissible to hold . . . that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

Id. at 367-68, 51 S.Ct. at 535. The Seventh Circuit has reasoned therefrom that the fact that one of the alternative bases for a conviction is merely legally invalid (rather than constitutionally invalid as in *Stromberg* itself) also requires setting aside the conviction. *Cramer v. Fahner,* 683 F.2d 1376, 1379-80 (7th Cir.), *cert. denied,* 459 U.S. 1016, 103 S.Ct. 376, 74 L.Ed.2d 509 (1982). Senior Judge Hoffman wrote that, "[w]here a verdict is supportable on one ground but not on another, and it is impossible to tell which grounds the jury selected, the conviction is unconstitutional." *Id.* at 1379-80 (citing *Stromberg*). The Fourth Circuit has expressed its agreement with the above-quoted proposition, stating: "[w]here the jury considered alternate theories of liability, we must reverse the convictions if either theory is an improper basis for punishment." *United States v. Mallas,* 762 F.2d 361, 363 n. 3 (4th Cir. 1985). As noted, the 20 counts of mail fraud listed alternatively with two acts of bribery as predicate offenses for Mr. Mandel's substantive RICO offense cannot be deemed federal offenses. Therefore, they are not RICO predicate offenses. It is impossible to determine from the general verdict which of the predicate offenses were found by the jury to

constitute the requisite "pattern of racketeering activity" underlying Mr. Mandel's RICO conviction. *See* Note, *United States v. Mandel: The Mail Fraud and En Banc Procedural Issues,* 40 Md.L.Rev. 550, 552 n. 11 (1981). Consequently, the RICO conviction of petitioner Mandel cannot stand.

VIII.

The Government premises its opposition to these petitions chiefly on its contention that the evidence at trial showed that petitioners engaged in bribery,[9] in violation of Maryland law, and that this bribery deprived the State of something of value, in two ways. First, the State was deprived of the bribe money that Mandel received, which belonged to the State under a constructive trust-type theory. *See* Paper # 640, at 29 (citing, *e.g., United States v. Kearns,* 595 F.2d 729, 733-34 (D.C.Cir. 1978); *United States v. Podell,* 572 F.2d 31, 35 (2d Cir.1978).[10] Second, the State was deprived of racing days that "belonged to the people" as a whole. *See id.* at 34. Thus, the Government argues, *McNally's* requirement of showing a scheme to

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[9] An additional argument made by the Government, *i.e.,* that it charged and proved that petitioners' scheme to defraud violated the Maryland bribery statute and that this *alone* constituted mail fraud, is totally without merit. All of the essential elements of mail fraud must be proved. Proof of bribery alone does not satisfy this requirement.

[10] The Court notes an important point about the cases referred to by the Government in support of its constructive trust argument. The cases cited involved direct proof of the deprivation of property element of mail fraud by use of the constructive trust theory. In *Kearns,* for example, the Government brought a civil action for breach of fiduciary duty against the former president of the Export-Import Bank of the United States (Eximbank) to recover profits from sale of his personal stock holdings to a company having extensive dealings with Eximbank.

deprive the victim of property was adequately made out by the evidence at trial.

The problems with the Government's view of the matter are as follows.[11] First, there is substantial doubt that the Maryland law, or the general law of *quid pro-quo*, relating to bribery was ever adequately laid before the jury in relation to the mail fraud counts or otherwise. This doubt is evident from the panel opinion of the Fourth Circuit reversing the conviction and from the equal division of the first *en banc* panel on this point.[12] Second, the jury was never instructed on the constructive trust theory *or* on the racing-days-as-items-of-value theory, and no party treated these theories as part of the prosecution's case at trial or on appeal. Third, and most important, the jury was instructed under a theory, which *McNally* clearly shows never has been within the reach of the mail fraud statute, that allowed a conviction if the jurors simply became convinced that the defendants had subverted the process of honest government in Maryland. The evidence of concealment of ownership of Marlboro shares and of Mandel's secret financial arrangements certainly showed that something fishy, and perhaps dishonest, involving

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[11] The Court notes that the petitioners' rebuttal characterization of the Government's present view as yet another "flip-flop" in its theory of prosecution has substantial merit. *See United States v. Mandel*, 602 F.2d at 655. Furthermore, a good argument can be made tht it is inequitable to allow the Government to revert to a bribery theory now, its prosecutors having conducted themselves at trial in a way that disavowed a bribery theory as relevant to mail fraud, thereby putting all their mail fraud eggs in the "good government" basket. *See* Tr. 1524; 10869; 11256-57; 11382-83.

[12] The Fourth Circuit's *en banc* affirmance has been the subject of both scholarly and lay criticism. *See* Note, *United States v. Mandel: The Mail Fraud and En Banc Procedural Issues*, 40 Md.L.Rev. 550 (1981); B. Jacobs, *Thimbleriggers*, Chapter 13 (1984).

Maryland's governor and some of those personally and politically closest to him was going on. Mandel might well have been bribed. His co-defendants might well have bribed him. But, however strong the evidence of dishonesty or bribery, the jury was told it could convict for something that did not amount to a federal crime.

Finally, even accepting the view that the evidence of dishonesty was strong, it must be remembered that it took the jury a dozen days of deliberation to convict, and it took three appellate opinions (without even an explanation of why the convictions should stand) before these convictions became final. In these circumstances, and in light of *McNally*, the interests of justice favor the grant of the relief sought.[13]

IX.

The result, then, is that writs of error *coram nobis* will be issued separately, vacating all of petitioners' convictions.

X.

Finally, it must be remembered that this Court's action on these petitions has nothing to do with the petitioners' guilt or innocence, in any moral sense. The people of Maryland, as a matter of natural law, have and have always had an inalienable right to good government. A jury of twelve citizens found beyond a reasonable doubt that the petitioners had deprived all the citizens of Maryland of

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[13] Given that petitioners herein repeatedly objected to the unwarranted extension of the mail fraud statute at trial and on appeal, this case is clearly distinguisable from *United States v. Osser*, No. 72-384 (E.D.Pa. Oct. 7, 1987) wherein Senior Judge Van Artsdalen denied a petition for writ of error *coram nobis* on the basis that the petitioner had not preserved a *McNally* point of objection.

that right. This conduct, however, for reasons amply set forth above, cannot sustain a judgment that the defendants were guilty of federal crimes. A final answer to the question of petitioners' guilt or innocence, in any broader sense than that, must await the judgment of history.

XI.

For the reasons stated, an Order will be entered separately, granting to petitioners writs of error *coram nobis* and setting aside the convictions and adjudications of guilt of all petitioners. The Government shall be required to repay any fines paid by the petitioners, within 90 days of the date hereof.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-7027

UNITED STATES OF AMERICA, APPELLANT

v.

MARVIN MANDEL, ET AL, APPELLEES

[Filed Mar 1, 1989]

ORDER

On February 3, 1989, we entered our order denying the motion of the government to file its petition for rehearing out of time, and, on February 7, 1989, the government filed its motion that we reconsider our said order of February 3, 1989.

The panel considered the motion to reconsider its order of February 3, 1989 denying the motion of the government to file its petition for rehearing out of time and is of opinion to grant the said motion.

The said petition for rehearing having been filed out of time, there was a request for a poll of the court on the petition for rehearing en banc. Upon the poll of the court,

those voting in favor of rehearing en banc were Judges Hall, Phillips, Murnaghan, Sprouse and Wilkins, and those voting in opposition to rehearing the case en banc were Judges Ervin, Russell, Widener, Chapman and Wilkinson, so fewer than a majority of the judges in regular active service qualified to vote and voting favor the rehearing of this case en banc.

The panel considered the petition for rehearing and is of opinion it is without merit.

Upon consideration of all of which, it is accordingly ADJUDGED and ORDERED as follows:

I

The motion that the government be permitted to file its petition for rehearing out of time shall be, and the same hereby is, granted.

II

The petition for rehearing en banc shall be, and the same hereby is, denied.

III

The petition for rehearing by the panel shall be, and the same hereby is, denied.

All the judges concur in the preamble to this order so far as it may affect any action each has taken in this proceeding.

Judges Russell, Widener and Hall concur in paragraph I of this order.

Judges Ervin, Russell, Widener, Chapman and Wilkinson concur in paragraph II of this order. Judges Hall, Phillips, Murnaghan, Sprouse and Wilkins dissent therefrom.

Judges Russell and Widener concur in paragraph III of this order. Judge Hall dissents therefrom.

Judge Winter did not participate in this proceeding.

/s/ H. E. WIDENER, JR.
For the Court

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